

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3 ELBA I. MATIAS PEREA

4 Plaintiff

5 v.

CIVIL NO. 05-1426 (DRD/GAG)

6 COMMISSIONER OF SOCIAL SECURITY

7 Defendant

8 **MEMORANDUM OPINION AND ORDER**

9 Upon careful review and consideration of the parties' memoranda (Docket Nos. 6 and 15),
10 a well as the administrative record, the Court concludes that this case must be **REMANDED** to the
11 Commissioner of Social Security for further proceedings consistent with the instructions that follow.

12 Here, the administrative law judges (ALJ) based his RFC assessment on that prepared by
13 *non-examining* medical experts. Such RFC assessments stand in sharp contrast with the opinion of
14 plaintiff's treating medical experts. For example, Dr. Ariel Rojas Davis, a treating psychiatrist,
15 noted that plaintiff developed a depressive state in which she showed psychomotor retardation,
16 insomnia, forgetfulness and crying spells. He further described plaintiff's RFC as *markedly limited*
17 in every category, including memory, concentration, social interaction and adaptation. (See Tr. 255-
18 263, 321-327). The ALJ, contrariwise, concluded that plaintiff had the RFC to "perform a full range
19 of heavy work activity, not involving the performance of complex, detailed and skilled tasks, or
20 frequent bilateral handling, fingering and manipulation". (See Tr. 23, 26). Also, the non-examining
21 medical experts concluded that plaintiff was not significantly limited or only moderately limited in
22 all areas of functioning. (See Tr. 159-171).

23 Where, as here, a Social Security disability claimant has objective symptoms, which are
24 supported by medical evidence of record, the Commission is required to obtain a RFC assessment
25 from an examining physician. See Heggarty v. Sullivan, 947 F. 2d 990, 997 n. 1 (1st Cir. 1991);
26 Rivera Figueroa v. S.H.H.S., 837 F. 2d 4, 6 (1st Cir. 1988); Rivera Torres v. S.H.H.S. 837 F. 2d 4,
27 6 (1st Cir. 1988); Morales Colón v. Commissioner of Social Security, 245 F. Supp. 2d 395, 400
28 (D.P.R. 2003).

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1 Although the Commissioner (or his designee, the ALJ) retains the responsibility of weighing
2 conflicting evidence of record, see Seavey v. Barnhart, 276 F. 3d 1, 10 (1st Cir. 2001), the ALJ cannot
3 discredit a RFC report by an examining expert by virtue of an inconsistent report by a non-
4 examining expert. The Commissioner may in fact weigh differing RFC conclusions by examining
5 experts. This, however, was not the case below. See, e.g., Martínez v. Commissioner of Social
6 Security. 306 F. Supp. 2d 98, 99 (D.P.R. 2004).

7 Accordingly, the case must be **REMANDED** for further proceedings consistent with this
8 opinion. This ruling is not an opinion on the ultimate merits of plaintiff's claim. More so, upon
9 remand, the ALJ is at his discretion to accept any additional evidence he deems relevant.

10 **SO ORDERED.**

11 In San Juan, Puerto Rico this 20th day of December, 2005.

12
13 */s/ Gustavo A. Gelpi*

14 GUSTAVO A. GELPI
15 United States Magistrate-Judge
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